

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34281/34282

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 468
	)	
Plaintiff-Respondent,	)	Filed: May 21, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
BRITTNEY DREAM BERG,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

---

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail; Hon. Michael E. Wetherell, District Judges.

Orders revoking probation, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

---

LANSING, Chief Judge

In these cases consolidated on appeal, appellant Brittney Dream Berg challenges the revocations of her probations and the district courts' failures to sua sponte reduce her sentences on revocation. We do not address the merits of her arguments, however, because an issue raised by respondent State of Idaho is dispositive. The State contends that the district courts were without subject matter jurisdiction to place Berg on probation in the first instance and that the orders granting probation were therefore void. Consequently, the State contends, there can be no error attendant to the revocation of the probations. We agree.

I.

PROCEDURAL HISTORY

In case no. 34281, Berg was convicted of grand theft. In early February 2004, the district court entered a judgment imposing a unified sentence of five years, with one and one-half years fixed, and retaining jurisdiction for 180 days pursuant to I.C. § 19-2601(4). After conducting a

rider<sup>1</sup> review hearing the district court entered an order placing Berg on probation, but this order was not entered until sixty-five days after the retained jurisdiction period ended. In case no. 34282 Berg was convicted of forgery before a different district judge. Also in early February 2004, the court entered a judgment of conviction imposing a concurrent unified sentence of seven years, with two years fixed, and retained jurisdiction for 180 days. This district court also subsequently entered an order placing Berg on probation after rider review, but this court's order was not entered until fifty-eight days after the retained jurisdiction period ended. More than two and one-half years later, both district courts revoked probation after Berg was found in violation of her probation terms. On appeal, Berg challenges these revocation orders.

## II.

### ANALYSIS

The State argues that Berg's challenge to the revocation orders is without merit because the district courts lacked jurisdiction to place her on probation in the first instance. This is so, the State contends, because the orders granting probation were entered after expiration of the section 19-2601(4) retained jurisdiction period.

We are constrained to agree. This question is controlled by the Idaho Supreme Court's decision in *State v. Taylor*, 142 Idaho 30, 121 P.3d 961 (2005). There, the district court had retained jurisdiction over the defendant and, at the conclusion of rider review hearings, the court suspended the sentence and placed the defendant on probation, but did so twenty-four days after the expiration of the 180-day period of retained jurisdiction. The State appealed, and the Supreme Court reversed the order of probation, stating:

The issue presented by this appeal is whether the district court had jurisdiction to place the Defendant on probation after the expiration of the 180-day period of retained jurisdiction. Idaho Code § 19-2601(4) provides that a court may

Suspend the execution of the judgment at any time during the first one hundred eighty (180) days of a sentence to the custody of the state board of correction. The court shall retain jurisdiction over the prisoner for the first one hundred eighty (180) days . . . . The prisoner will remain committed to the board of correction if not affirmatively placed on probation by the court.

---

<sup>1</sup> The time spent in the retained jurisdiction program is commonly called a "rider."

The statute only permits a court to retain jurisdiction over a prisoner for 180 days. Upon the expiration of that time period, the court loses jurisdiction to place the prisoner on probation.

In 2005 the statute was amended to extend the court's jurisdiction for thirty additional days in limited circumstances, but in 2004 there was no exception to the expiration of the court's jurisdiction. Because the 180-day period of retained jurisdiction expired without the district court affirmatively placing the Defendant on probation, the Defendant remained committed to the custody of the Idaho Board of Correction. The district court's judgment placing the Defendant on probation was therefore void because the court no longer had jurisdiction.

*Id.* at 31-32, 121 P.3d at 962-63.<sup>2</sup>

The only possible distinction between *Taylor* and the present case is that in *Taylor* the State timely appealed from the order of probation, whereas here the State did not appeal from the probation orders and, instead, is raising its jurisdictional issue years later. However, because the *Taylor* Court's reference to the trial court's lack of jurisdiction must have meant lack of subject matter jurisdiction, this issue can be raised by the State at any time. *See State v. Armstrong*, 146 Idaho 372, 377-78, 195 P.3d 731, 736-37 (Ct. App. 2008). A party may not be estopped from raising the lack of subject matter jurisdiction, and the issue cannot be waived. *Id.* at 374, 195 P.3d at 733.

Accordingly, we conclude that the district courts' orders placing Berg on probation were void for lack of jurisdiction at the outset, and therefore the district courts could not have erred by revoking those void probations.

This disposition of Berg's challenge to the probation revocation orders renders moot the other issue that she has raised on appeal--her contention that she was deprived of due process of law because the court reporter lost the stenographic notes or recording of the jurisdictional

---

<sup>2</sup> As noted by the *Taylor* Court, in 2005 the Idaho legislature amended Idaho Code § 19-2601(4) to add the following provision: "In extraordinary circumstances, where the court concludes that it is unable to obtain and evaluate the relevant information within the one hundred eighty (180) day period of retained jurisdiction, or where the court concludes that a hearing is required and is unable to obtain the defendant's presence for such a hearing within such period, the court may decide whether to place the defendant on probation or release jurisdiction within a reasonable time, not to exceed thirty (30) days, after the one hundred eighty (180) day period of retained jurisdiction has expired." Ch. 186, § 1, 2005 Idaho Sess. Laws 572. As in *Taylor*, this amendment has no application here because Berg's relevant proceedings occurred in 2004, before the effective date of the amendment. Even if the amendment *did* apply, the district courts' probation orders here were entered beyond the 30-day extension allowed under the amended statute.

review hearing in case no. 34282 and is unable to produce a transcript of that proceeding for this appeal. We acknowledge that an appellant's right to due process can be implicated by loss of the ability to produce a transcript of her pertinent judicial proceedings. *See Ebersole v. State*, 91 Idaho 630, 428 P.2d 947 (1967). However, because the jurisdictional bar rendered Berg's probations invalid from the outset and prevents this Court from reaching the merits of her challenges to the revocation orders, the missing transcript has become irrelevant.

Because the district courts had no subject matter jurisdiction to place Berg on probation, the courts could not have erred in revoking those probations. The orders revoking probation are therefore affirmed.

Judge GUTIERREZ and Judge GRATTON **CONCUR.**